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## The Survey of New York Practice Table of Contents

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# THE SURVEY OF NEW YORK PRACTICE

## TABLE OF CONTENTS

### DEVELOPMENTS IN THE LAW

<i>Rogers-Bartolomeo rule is not triggered by an out-of-state pending charge</i> .....	197
--	-----

### CIVIL PRACTICE LAW AND RULES

<i>CPLR 4504(a): A plaintiff in a personal injury action cannot effect a waiver of the defendant's physician-patient privilege by placing the defendant's physical condition "in controversy"</i> .....	205
---	-----

### GENERAL MUNICIPAL LAW

<i>GML § 50-e(5): Denial of renewed application to serve late notice of claim on city was not an abuse of discretion, despite the city's actual knowledge of essential facts of claim, where petitioner's delay was excessive, his excuse insufficient, and city was substantially prejudiced</i> .....	213
---	-----

### RENT CONTROL

<i>9 N.Y.C.R.R. § 2204.6(d): "Family" as used in New York City's Rent and Eviction Regulation includes nontraditional and nonlegal relationships</i> .....	220
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## INTRODUCTION\*

In this first issue of Volume 64, *The Survey* examines several

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\* The following abbreviations will be used uniformly through *The Survey*:

New York Civil Practice Law and Rules (McKinney) .....	CPLR
New York Civil Practice Act .....	CPA
New York Criminal Procedure Law (McKinney) .....	CPL
New York Code of Criminal Procedure .....	CCP

noteworthy developments in New York law. In *People v. Bing*, the Appellate Division, Second Department, refused to extend the rule which provides for the suppression of all inculpatory statements made to the police in the absence of counsel where the police knew that the individual was represented by an attorney in an unrelated criminal charge. The court held that when the unrelated charge is pending in a foreign jurisdiction, New York's important interest in law enforcement outweighs its interest in protecting a defendant's right to counsel in the foreign proceeding.

In *Dillenbeck v. Hess*, the Court of Appeals held that a defendant in a personal injury case does not affirmatively place her physical condition "in controversy" simply by denying the allegations that her intoxication was the proximate cause of the plaintiff's injuries and asserting the affirmative defenses of comparative negligence and failure to wear a seatbelt. Thus, the court found that this defendant had not effected a waiver of the physician-patient privilege, and the plaintiff was not entitled to obtain the results of the defendant's blood-alcohol test.

The Appellate Division, First Department, in *Robertson v. City of New York*, restricted plaintiffs' right to file late notices of claim despite a municipality's actual knowledge of the essential facts underlying the claim. Notwithstanding GML section 50e(5), which authorizes a court to examine whether a municipality had actual knowledge of the events in question in determining whether to allow service of a late notice of claim, the *Robertson* court held that the City of New York had been unduly prejudiced by the inordinate delay of approximately thirty months.

Finally, *The Survey* examines the Court of Appeals' expansive interpretation of the term "family" as it applies to the noneviction protection of New York City's rent control laws. The court, in *Braschi v. Stahl*, held that this protection extends to nontraditional familial relationships which objectively are consistent with a family living arrangement.

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Real Property Actions and Proceedings Law (McKinney) . . . . .	RPAPL
Domestic Relations Law (McKinney) . . . . .	DRL
Estates, Powers and Trusts Law (McKinney) . . . . .	EPTL
General Business Law (McKinney) . . . . .	GBL
General Municipal Law (McKinney) . . . . .	GML
General Obligations Law (McKinney) . . . . .	GOL
D. Siegel, New York Practice (1978 & Supp. 1987) . . . . .	SIEGEL
Weinstein, Korn & Miller, New York Civil Practice (1988) . . . . .	WK&M
The Survey of New York Practice . . . . .	THE SURVEY

It is hoped that the discussion of these issues in *The Survey* will be of interest and assistance to the bench and bar.

### DEVELOPMENTS IN THE LAW

*Rogers-Bartolomeo rule is not triggered by an out-of-state pending charge*

In New York, a criminal defendant represented by counsel may not be questioned in the absence of his attorney<sup>1</sup> unless he waives his right to counsel in the presence of his attorney.<sup>2</sup> Under

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<sup>1</sup> *People v. Arthur*, 22 N.Y.2d 325, 329, 239 N.E.2d 537, 539, 292 N.Y.S.2d 663, 666 (1968). The *Arthur* court held that such questioning would constitute a "deprivation of a fundamental constitutional right." *Id.* The right to counsel during interrogations is "grounded in this State's constitutional and statutory guarantees of the privilege against self-incrimination, the right to the assistance of counsel, and due process of law." *People v. Hobson*, 39 N.Y.2d 479, 483, 348 N.E.2d 894, 897, 384 N.Y.S.2d 419, 421 (1976). Developing independently of the right to counsel as guaranteed by the sixth amendment of the United States Constitution, see U.S. CONST. amend. VI, the right to counsel under the New York Constitution, see N.Y. CONST. art. 1, § 6, often provides greater protection for defendants than its federal counterpart. See e.g., *Hobson*, 39 N.Y.2d at 483-84, 348 N.E.2d at 897, 384 N.Y.S.2d at 422; see also *People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 302, 501 N.E.2d 556, 560, 508 N.Y.S.2d 907, 911 (1986) ("Although State courts may not circumscribe rights guaranteed by the Federal Constitution, they may interpret their own law to supplement or expand them"), *cert. denied* 479 U.S. 1091 (1987).

In addition to providing the accused with legal advice at a crucial time, an attorney's presence at police interrogations can deter unlawful police conduct and coercion, as well as ensure the accuracy and trustworthiness of statements made by the accused. 31 N.Y. JUR. 2d *Criminal Law* § 41, at 159 (1983). Furthermore, the presence of counsel during police questioning "serves to equalize the positions of the accused and sovereign, mitigating the coercive influence of the State and rendering it less overwhelming." *People v. Rogers*, 48 N.Y.2d 167, 173, 397 N.E.2d 709, 713, 422 N.Y.S.2d 18, 22 (1979).

Once the "critical stage" of a criminal proceeding is reached, this indelible right to counsel attaches regardless of whether the defendant has requested counsel, and the police may then no longer question the defendant unless he waives counsel in his attorney's presence. *People v. Rowell*, 59 N.Y.2d 727, 730, 450 N.E.2d 232, 233, 463 N.Y.S.2d 426, 427 (1983). This right attaches upon the commencement of a criminal action or upon "significant judicial activity." See *People v. Samuels*, 49 N.Y.2d 218, 221, 400 N.E.2d 1344, 1345-46, 424 N.Y.S.2d 892, 894 (1980); *People v. Simpson*, 125 App. Div. 2d 347, 347-48, 508 N.Y.S.2d 613, 614-15 (2d Dep't 1986). Even if the police have not commenced a formal criminal action, a defendant's retention of an attorney on a criminal matter invokes his right not to be questioned on the matter outside his attorney's presence. See *People v. Skinner*, 52 N.Y.2d 24, 31-32, 417 N.E.2d 501, 505, 436 N.Y.S.2d 207, 211 (1980). A defendant's request for counsel is sufficient to trigger this right. *People v. Cunningham*, 49 N.Y.2d 203, 205, 400 N.E.2d 360, 361, 424 N.Y.S.2d 421, 422 (1980).

<sup>2</sup> *Arthur*, 22 N.Y.2d at 329, 239 N.E.2d at 539, 292 N.Y.S.2d at 666. By requiring that a defendant's attorney be present for a valid waiver, the Court of Appeals has sought to ensure that the "waiver of a constitutional right [is] competent, intelligent and voluntary." *Hobson*, 39 N.Y.2d at 484, 348 N.E.2d at 898, 384 N.Y.S.2d at 422. This requirement "simply recognizes the right and need of an individual to have a competent advocate at his or